

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JORMA KARHUMAKI

Appeal No. 97-2019
Application No. 08/430,196¹

HEARD: July 15, 1999

Before MCQUADE, CRAWFORD, and GONZALES, Administrative Patent Judges.

CRAWFORD, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 5, which are all of the claims pending in this application.

The appellant's invention relates to a body treatment apparatus. An understanding of the invention can be derived

¹ Application for patent filed April 27, 1995.

from a reading of exemplary claim 1, which appears in the appendix to the appellant's brief.

The References

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Jordan	786,127	Mar. 28, 1905
Cuthbertson	3,827,087	Aug. 6, 1974
Ekman	3,924,278	Dec. 9, 1975
Wakenshaw 1985	4,546,505	Oct. 15,
Johansson	4,809,368	Mar. 7, 1989

The Rejections

Claims 1 through 3 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ekman in view of Wakenshaw and Cuthbertson.

Claim 4 stands rejected under 35 U.S.C. § 103 as being unpatentable over Ekman, Wakenshaw and Cuthbertson as applied to claim 1 above, and further in view of Johansson.

Claim 5 stands rejected under 35 U.S.C. § 103 as being unpatentable over Ekman, Wakenshaw and Cuthbertson as applied to claim 3 above, and further in view of Jordan.²

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the examiner's answer (Paper No. 10, mailed December 13, 1996) and final rejection (Paper No. 5, mailed May 28, 1996) for the examiner's complete reasoning in support of the rejections, and to the appellant's brief (Paper No. 9, filed October 21, 1996).

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

² A rejection under 35 U.S.C. § 112, second paragraph was overcome by an amendment filed subsequent to the Final Rejection (See Paper No. 8).

We turn first to the examiner's rejection of claims 1 through 3 under 35 U.S.C. § 103 as being unpatentable over Ekman in view of Wakenshaw and Cuthbertson. In the examiner's view Ekman teaches all the claimed elements of claim 1 except for the provision of inlet and plural outlet means. The examiner cites Wakenshaw for teaching an analogous body treatment apparatus that includes a tub 18 with inlet means 44 and Cuthbertson for teaching an analogous tub which further includes dual outlet means 42 and 44. According to the examiner:

. . . it would have been obvious to one of ordinary skill in the art to associate inlet means with the Ekman tubs in order to facilitate body treatment . . . it would have been obvious to one of ordinary skill in the art to associate two outlet means with the Ekman tubs in order to facilitate water drainage. [examiner's answer at pages 4 to 5].

Appellant argues that none of the references discloses a double tub with multiple inlets and outlets. Appellant also argues that Ekman discloses only one inlet/drain in only one of the tubs and that Wakenshaw discloses only one tub section. These arguments are not persuasive because nonobviousness cannot be established by attacking the references individually

when the rejection is predicated upon a combination of prior art disclosures. See In re Merck & Co. Inc., 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986).

Appellant further argues that Wakenshaw includes one inlet and one outlet for circulating water and does not suggest multiple inlets. Appellant is not persuasive. Wakenshaw clearly discloses multiple inlets 44 to the tub (see col. 4, lines 36 to 39).

Appellant also argues that Cuthbertson doesn't have separate outlets because there is a pipe which is connected to each outlet. This argument is not persuasive because it is not commensurate with the actual scope of claim 1 which does not recite "separate" outlets. Rather, claim 1 recites "first outlet means for draining fluid from said first tub, and second outlet meant for draining fluid from said second tub." Cuthbertson discloses a first outlet means 44 which drains fluid from a first tub and a second outlet means 42 for draining fluid from a second tub.

Appellant also argues that none of the cited references discloses a tub which is rotatable between a position in which the person in the tub is in a sitting position and a position

in which a person in the tub is in a reclining position. It is appellant's position that the Ekman reference will have the person in the tub reclining in both positions due to the long seat and sloping back. We do not agree. In our view, Ekman clearly discloses at col. 2, line 68 to col. 3, line 4 and depicts in figure 1 a position of the tub in which the person in the tub is in the sitting position.

In view of the foregoing, we will sustain the examiner's rejection of claim 1 under 35 U.S.C. § 103 as unpatentable over Ekman in view of Wakenshaw and Cuthbertson.

In regard to claim 2, the appellant argues that Wakenshaw discloses a fluid control means to achieve recirculation of water in the tub and does not suggest multiple inlets and outlets for different treatments of different portions of the body. This argument is not persuasive for two reasons. Firstly, appellant cannot successfully attack a rejection based on a combination of references by attacking the references individually. Id at 1097. In this regard, Cuthbertson has been cited for teaching multiple outlets. Secondly, the argument is not commensurate with the scope of claim 2 which does not recite that the outlets and inlets

provide different treatments of different portions of the body. Therefore, we will also sustain the examiner's rejection of claim 2 under 35 U.S.C. § 103.

In regard to claim 3, appellant argues that element 23 of Ekman is not a cover means but a wall extension. We do not agree. It is clear from figure 4 that auxiliary member 23 which includes top edge 25 partially encloses a person within the tub unit. Therefore, we will also sustain the examiner's rejection of claim 3 under 35 U.S.C. § 103.

Claim 4 has been rejected under 35 U.S.C. § 103 as being unpatentable over Ekman, Wakenshaw and Cuthbertson as applied to claim 1 above, and further in view of Johansson.

Appellant has

indicated that claim 4 can be considered with claim 1.

Therefore, we will sustain the rejection of claim 4 as well.

We turn lastly to the examiner's rejection of claim 5 under 35 U.S.C. § 103 as being unpatentable over Ekman, Wakenshaw and Cuthbertson as applied to claim 1 above and further in view of Jordan. It is the examiner's view that

. . . Jordan reference which discloses an analogous bathing apparatus which further includes cover means 10 having a

complimentary cover 12. Therefore, in consideration of Jordan, it would have been obvious to one of ordinary skill in the art to associate a complementary cover with the Ekman cover means in order to enable use of the bathing apparatus for steam treatment. [examiner's answer at page 5].

Appellant argues that the cover means of Jordan does not disclose a first cover for partially covering the body and a second complementary cover to cover the rest of the body because the Jordan cover means has a small hole for the neck which allows the head to be outside the cover.

In our view, the phrase "completely enclose said tub unit" is broad enough to include a tub unit with a cover and complementary cover as disclosed in Jordan which encloses the tub unit and has a small hole for the neck of the person bathing in the tub. In this regard, we note that WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (The Riverside Publishing Company, 1984) defines "enclose" as "to surround on all sides." The cover 10 and complementary cover 12 disclosed in Jordan certainly surrounds the tub unit on all sides notwithstanding the small hole for the neck of the bather.

In view of the foregoing, the examiner's rejection of claim 5 under 35 U.S.C. § 103 will be sustained.

The decision of the examiner is affirmed.

No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED

JOHN P. MCQUADE)	
Administrative Patent Judge)	
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)	
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)	BOARD OF PATENT
MURRIEL E. CRAWFORD)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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CRAWFORD

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APPLICATION NO. 08/430,196

PJ CRAWFORD

APJ GONZALES

APJ MCQUADE

DECISION: **AFFIRMED**

Prepared By: Gloria Henderson

DRAFT TYPED: 18 Jul 00

FINAL TYPED: